In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1020

ALLSTATE MORTGAGE CORPORATION AND CHARLES KARP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that the district court erred in refusing to grant immunity to a prospective defense witness, and (2) that the trier of fact considered hearsay evidence that was not admissible against petitioners.

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on eleven counts of mail fraud, in violation of 18 U.S.C. 1341. In addition, petitioner Karp was convicted on five counts, and petitioner Allstate Mortgage Corporation on two counts, of making false statements to the Federal Housing Administration (FHA), in violation of 18 U.S.C. 1010. Karp was sentenced to concurrent terms of one year's imprisonment on each mail fraud count, and to concurrent terms of one year's imprisonment on each false statement count, the latter to run consecu-

tively to the concurrent terms on the mail fraud counts. Allstate was fined $18,000. The court of appeals affirmed (Pet. App. A).[1]

Petitioners' convictions arose out of a scheme to defraud homeowners and the FHA in connection with the issuance of housing loans. In 1971, Karp incorporated Allstate to operate the mortgage brokerage business that he had previously operated as a sole proprietor. Allstate's business activity entailed the solicitation of persons who were buying homes on contract, for the purpose of arranging FHA-insured mortgage refinancing for them. The buyers were first contacted through mail solicitations (Govt. Exs. 2-G-1, 7-A, 8-A), and then by sales representatives. The Allstate representatives misled potential customers in several respects. Allstate was portrayed as a mortgage company that would lend its own money, rather than as a broker (Tr. 227, 309, 1581), and potential customers were not informed that $1,000 of the mortgage proceeds would be paid to Allstate as a commission for arranging the mortgage financing.

Twelve government witnesses testified concerning their business dealings with Allstate. In a typical initial meeting, the Allstate representative would advise the potential customer that he would have to pay only a fee of approximately $50 to cover the costs of a credit investigation and appraisal. The Allstate representative would then request the customer to sign a number of documents allegedly relating to the credit investigation and property appraisal. Typically, the documents would be stacked in a manner that exposed the space for the customer's signature but concealed the documents' contents. In this way, Allstate would obtain the customer's signature on a blank agreement to pay for Allstate's

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[1]The judgment of the court of appeals was entered on December 10, 1974, and rehearing was denied on January 13, 1975 (Pet. App. B). The petition for a writ of certiorari was filed on February 14, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court.

brokerage services. The customer would not be given copies of the documents (Tr. 55-57, 297-301, 303-305, 374-380, 465-467, 566-574, 1116-1117, 1302-1309, 1510-1513, 1557, 1587-1594, 1621-1624).

After the customer had signed the documents, Allstate would submit them to various approved mortgage companies for processing with the FHA. Most of the transactions leading to this prosecution related to mortgages obtained from Advance Mortgage Company, which would obtain FHA insurance for the funds it loaned to Allstate's customers. Karp and Allstate had an arrangement with Advance Mortgage by which Karp would retain the customer's blank fee agreement and furnish Advance with only a photocopy. An Advance representative would then complete the photocopied fee agreement by filling in a figure less than $1,000 in the space that had been left blank for Allstate's fee. This copy of the fee agreement would then be submitted to the FHA in support of the loan application. Karp, however, would complete the original copy of the fee agreement by filling in the figure of $1,000.

Upon approval of the application for mortgage insurance, the mortgage funds would be allocated by the mortgage company. An Allstate representative would then accompany the mortgagor to the Chicago Title and Trust Company to close the refinancing transaction. At that time, Allstate would receive a $1,000 brokerage fee out of the mortgage proceeds (Govt. Exs. 1-26-E-5, 2-E-5, 4-E-3, 4-E-4, 9-E-3, 9-E-4, 11-E-3, 11-E-4, 19-E-5). If the customer decided not to accept the refinancing, Allstate would institute a collection action based on the original copy of the fee agreement that Karp had completed (Govt. Exs. 3-21-D-1, 7-D-1, 8-23-D-1, 12-D-1, 14-D-1, 18-D-1, 19-D-1).

Karp played the major role in this scheme to defraud. As president of Allstate, he hired representatives to solicit contract buyers and directed their operations. Following the successful solicitation of a customer, Karp reviewed the documents and completed the blank fee agreements (Tr. 1824-1825). Karp also authorized legal actions in Allstate's name for the collection of fees from customers who decided, after committing themselves, not to refinance. Furthermore, Karp personally solicited customers on at least four occasions.[2] In each instance, Karp failed to disclose the $1,000 brokerage fee and concealed the contents of the fee agreement.

1. Wyatt Ross, an employee of a mortgage company, was called by the defense as a witness but asserted his privilege against self-incrimination during the course of direct examination. Petitioners claim (Pet. 4-11) that the trial court should have granted immunity to Ross as a defense witness, arguing that Ross would have testified that "it was an industry practice in Chicago for mortgagees to use estimates instead of actual figures for the closing cost requirements on the form" (Pet. 5). But if that was in fact an industry-wide practice, petitioner could have subpoenaed some other witness to testify to that effect. Since Ross's own testimony therefore was not indispensable, and was not considered, even by the defense, to be uniquely exculpatory, the trial court properly refused to grant Ross immunity against prosecutorial use of his testimony. See, *e.g.*, *United States* v. *Ramsey*, 503 F. 2d 524, 532 (C.A. 7); *Cerda* v. *United States*, 488 F. 2d 720, 723 (C.A. 9); *United States* v. *Berrigan*, 482 F. 2d 171, 190 (C.A. 3); *United States* v. *Jenkins*, 470 F. 2d 1061, 1063 (C.A. 9), certiorari denied, 411 U.S. 920; *Earl* v. *United States*, 361 F. 2d 531 (C.A. D.C.), certiorari denied, 388 U.S. 921.

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[2]Accounts of Karp's solicitation activities are contained in the testimony relating to his dealings with Mr. Charles Wiginton, Mr. Paul Goss, Mr. and Mrs. George Schroeder, and Mr. and Mrs. Gerald Bowen.

2. Petitioners also argue (Pet. 11-16) that the trial court improperly considered evidence that had been admitted solely against Howard Berg, a co-defendant. Responding to the closing argument of petitioners' counsel that no scheme to defraud had been established, the court stated (Tr. 2518-2519; Pet. 14):

> [T]he method of selling here, totally apart now from whether there was or wasn't a scheme—the personal encounter, method of selling, door to door selling, those conversations unfolded in such a way that as Agent Van Loon has testified Mr. Berg said, he didn't disclose the fee if he was afraid he was going to lose the sale or the customer. And in some instances it seems reasonable to infer that a person in the situation that your witnesses were would demonstrate a particular type of interest in the transaction, might inquire on their own about what the fee was, the conversation might proceed in such a way as to cause the salesman to believe, "Here I can disclose it to them."
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> And, indeed, you end up with a couple of agreements that are footnoted, percentages are used rather than dollar figures, and then you take another person who manifests apprehension about the fee, and the salesman concludes in this case, "I'm not going to tell him."

However, contrary to petitioners' contention that the court considered Berg's post-conspiracy statement against them, the extent of the court's consideration was made manifest in its findings: *"While Berg's statement is attributable only to him,* in many respects it characterizes an aspect of this scheme" (Tr. 2667-2668; emphasis added). Berg's statement was therefore taken by the court as merely illustrative of the fact, already established by the testimony of many of Allstate's customers, that the $1,000 fee was only selectively disclosed. The court's offhand reference to Berg's statement did not indicate that the court was considering that hearsay statement on the question of petitioners' guilt.

Absent a showing of substantive prejudice, a trial judge sitting without a jury is deemed to have considered only admissible and relevant evidence. *United States* v. *Penick*, 496 F.2d 1105, 1108 (C.A. 7), certiorari denied, 419 U.S. 897; *United States* v. *Schechter*, 475 F.2d 1099 (C.A. 5), certiorari denied, 414 U.S. 825; *United States* v. *McCarthy*, 470 F.2d 222, 224 (C.A. 6); *United States* v. *Stanley*, 411 F.2d 514, 516 (C.A. 7), certiorari denied, 396 U.S. 959. Moreover, in this case that presumption was reinforced by the trial judge's positive assertion that extraneous material had not been considered. See, *e.g.*, Tr. 2667.

But even if it were assumed *arguendo* that Berg's hearsay statement was erroneously considered against petitioners, the error was harmless in light of the overwhelming evidence of petitioners' guilt. See *Chapman* v. *California*, 386 U.S. 18; *United States* v. *Nicholson*, 492 F.2d 124 (C.A. 5); *United States* v. *Hudson*, 479 F.2d 251, 255 (C.A. 9), certiorari denied, 414 U.S. 1012; *United States* v. *McCarthy, supra*; *United States* v. *Stanley, supra*. As the court below properly noted, "[t]here remains, aside from such evidence, an abundance of relevant and competent evidence to establish their guilt beyond a reasonable doubt" (Pet. App. 2a). In contrast, in *Wong Sun* v. *United States*, 371 U.S. 471, and *United States* v. *Turnipseed*, 272 F. 2d 106 (C.A. 7), upon which petitioners rely (Pet. 15), the only evidence of guilt was the improperly considered post-conspiracy hearsay statement of a co-defendant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.